The Corporate Governance Review

Eleventh Edition

Editor
Willem J L Calkoen

The LawReviews

THE

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Editor
Willem J L Calkoen

THE LAWREVIEWS

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PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this 11th edition, we can see that corporate governance is becoming a more vital and all-encompassing topic, especially this year with covid-19 as well as climate issues, political instability, technological change, environmental, social and corporate governance (a stakeholder model to which many countries are moving), green finance and the demand from both employees and customers for a sound reputation for the best personal health and moral responsibility. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, and most of us work for them. Most corporations aim to add value to society, and they very often do. There is increasing emphasis on this. Some, however, are exploiting, polluting, poisoning and impoverishing us, which can create a depressed reputation for business. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards, management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in better corporate governance: parliaments, governments, European Commission, US Securities and Exchange Commission (SEC), Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports and 17 social development goals, the media, supervising national banks, more and more shareholder activists, proxy advisory firms, the Business Roundtable and all stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working very diligently. Nevertheless, there have been failures in some sectors and trust must be regained.

How can directors do all their increasingly complex work and communicate with all the parties mentioned above? What should executive directors know? What should non-executive directors know? What systems should be set up for better enterprise risk management? How can chairs create a balance against imperial chief executive officers (CEOs)? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? Is diversity and inclusion actively being pursued? Is the remuneration policy fair? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans and takeover defences?

Governments, the European Commission and the SEC are all pressing for more formal, inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on norms by codes and influential investor groups.

More international investors, Business Roundtable, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust: one-on-ones. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better tone from the top and work at complying with demands and trends for a better society?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code, and many countries produced national versions along the lines of the Cadbury comply or explain model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances when CEOs have gradually amassed too much power, or companies have not developed new strategies and have incurred bad results – and sometimes even failure. More are failing since the global financial crisis than before, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, stewardship codes for shareholders and shareholder activists, and requirements for reporting on non-financial issues. The European Commission has developed regulation for these areas as well. We see governments wanting to involve themselves in defending national companies against takeovers by foreign enterprises. We also see a strong movement of green investors, which often is well appreciated by directors. There is a move to corporate citizenship. Business Roundtable, with about 180 signatories, has embraced stakeholder corporate governance.

This all implies that executive and non-executive directors should work harder and more as a team on long-term policy, strategy, entrepreneurship and investment in research and development. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management, with new risks entering, such as the increasingly digitalised world and cybercrime, is an essential part of directors' responsibilities, as is the tone from the top.

Each country has its own laws, codes and measures; however, the chapters in this Review also show a convergence. Understanding differences leads to harmony. The concept underlying the book is that of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, when a quick first look at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that this Review will be seen as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who have helped with this project. I hope this book will give you food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of its readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

Willem J L Calkoen
NautaDutilh
Rotterdam
March 2021

Chapter 2

AUSTRIA

Martin Abram and Clemens Philipp Schindler[1]

I OVERVIEW OF GOVERNANCE REGIME

Austrian listed companies are incorporated in the form of a joint-stock corporation (JSC) or – less frequently – a European company (societas europaea (SE)). The most relevant sources of law for listed companies are:

a the Stock Corporation Act, or the Societas Europaea Act, and the Societas Europaea Regulation, which set forth the organisational framework for a company;
b the Stock Exchange Act, which regulates disclosure obligations, as well as the rules on insider trading, market manipulation and directors' dealings;
c the Takeover Act, which sets forth the framework for public takeover bids;
d the Commercial Code, which contains the applicable Austrian accounting rules;
e the Accounting Control Act, which is aimed at ensuring that financial and other information published by listed companies complies with national and international accounting standards;
f the (non-binding) Corporate Governance Code, which contains best practice rules and recommendations for listed companies; and
g regulations and circulars issued by the Austrian Financial Market Authority.

As regards the Corporate Governance Code, it is principally non-binding and applies only to listed JSCs or SEs that have committed themselves to complying with the Code; however, a commitment to comply with the Code is a prerequisite for entry to the prime market of the Vienna Stock Exchange.

Listed companies are subject to the supervision of the Financial Market Authority (in particular regarding insider trading, market manipulation and directors' dealings), the Takeover Commission (regarding takeover bids) and the Austrian Financial Reporting Audit Panel (for audits pursuant to the Accounting Control Act, unless the audits are made by the Financial Market Authority).

1 Martin Abram and Clemens Philipp Schindler are partners at Schindler Rechtsanwälte GmbH.

II CORPORATE LEADERSHIP

Most Austrian-based listed companies have a two-tier board structure (consisting of a management board and a supervisory board), even though the two-tier structure is mandatory only for JSCs – SEs may choose between a one-tier and two-tier structure. As there are only a few companies that have opted for a one-tier structure, the following overview focuses only on the two-tier structure.

i Board structure and practices

Management board

Role

The management board is responsible for managing the operations of the company, taking into account (as the Stock Corporation Act provides) the interests of the shareholders and the employees, and the public good. In performing its function, the management board is not subject to instructions by the supervisory board or the shareholders; however, certain decisions (such as the determination of business principles and the establishment or closure of business lines or production branches) and transactions (such as the sale or acquisition of shares or real estate, the granting and taking up of loans exceeding certain thresholds, and investment above certain thresholds) are subject to the consent of the supervisory board. These consent requirements are based on the Stock Corporation Act but can be (and typically are) made more specific or can be expanded in the rules of procedure for the management board or – less frequently for listed companies – in the articles of association. Certain transactions and decisions (e.g., acquisition of treasury stock, issuance of new shares or bonds, mergers, spin-offs or dissolution) require the prior consent of the shareholders' meeting. Further, the management board may decide, or be required (see Section V.i), to ask the shareholders' meeting for instructions on or approval of certain transactions.

Composition

According to the law, the management board can have one or more members. For certain regulated businesses (such as financial institutions or insurance companies), at least two members need to be appointed. In practice, listed JSCs have more than two members.

As a general rule, any two management board members together can represent the company, except if the articles of association allow for single signing authority and the appointment resolution bestows that authority on a board member.

The signing authority of each board member is published in the Companies Register; in business dealings, third parties can rely on this information in the Companies Register (if acting in good faith), even if the management board members fail to comply with internal restrictions on their representation powers.

Chairperson

If two or more management board members are appointed, the supervisory board typically also appoints the chief executive officer of the company as the chairperson of the management board. In the event of a tied vote, the chairperson has the deciding vote, except if the articles of association provide otherwise. In addition to the specific tasks delegated to him or her by (typically) the by-laws, the chairperson of the management board also is responsible for the preparation, convocation and documentation of the meetings of the management board. However, the chairperson is not entitled to give instructions to the other board members.

Delegation of tasks and committees

Even though the Stock Corporation Act provides that the operations of a JSC are managed by the members of the management board collectively, it is customary (and recommended by the Corporate Governance Code) that the various members of the management board have specific areas of responsibility (i.e., they would each be responsible for certain departments). This allocation is established either in the articles of association or the by-laws of the management board (which are adopted by the supervisory board) or by the management board itself. Even when certain management tasks are allocated exclusively to certain management board members, the other management board members are still responsible for proper supervision of the due performance of these tasks. Certain tasks cannot be delegated to individual board members (such as decisions on the fundamental business policy of the company or the convocation of general meetings when the company's equity is equal to or lower than its stated capital). It is not customary for the management board to establish committees. It should be noted that the allocation of tasks between the members of the management board does not dispense the management board members from keeping themselves informed of (and obtaining information about) developments and activities in areas allocated to other management board members or from acting if they perceive any deficiencies.

Supervisory board

Role

The supervisory board is tasked with the control and monitoring of the management board. In performing its functions, the supervisory board is not bound to instructions by the management board or the shareholders. The supervisory board can request reports of the management board and can inspect the books and records of the company. The supervisory board needs to hold a meeting at least once every calendar quarter.

Composition

According to law, the supervisory board must have at least three and no more than 20 members elected or nominated by the shareholders. For listed companies, the Corporate Governance Code recommends a maximum of 10 supervisory board members elected or nominated by the shareholders.

Representation of the company

Neither the supervisory board nor any of its members are entitled to represent the company, except in connection with the conclusion, amendment or termination of directors' agreements and legal proceedings of the company against the members of the management board. In these circumstances, the supervisory board is represented by its chairperson.

Chairperson

The supervisory board is required to elect from its members a chairperson and (at least one) vice chairperson. Even though this means that a representative delegated by the employees' council could also be so elected, in practice these positions are predominantly taken up by supervisory board members elected or nominated by the shareholders. Besides certain administrative duties (such as the convocation of the supervisory board meetings and preparation of the agenda), the chairperson of the supervisory board also takes the chair of the (annual or extraordinary) general meeting, is entitled to demand a report from the management board even without the support of other supervisory board members, and is required to sign certain applications of the company with the Companies Register.

Delegation of tasks and committees

The Stock Corporation Act allows for (and in one case mandates), and the Corporate Governance Code recommends, the establishment of committees of the supervisory board. Each committee established must have at least three members. For listed companies, the establishment of an audit committee is mandatory; in addition, the Corporate Governance Code recommends the creation of a nomination committee and a compensation committee. The mandatory audit committee is basically responsible for monitoring the company's accounting process, the internal control systems and any audit of the financial statements (and related documents), including the preparation for their approval. The audit committee is also tasked with proposing the auditor of the company to the general meeting and monitoring the independence of the appointed auditor. One member of the audit committee must be a person with special knowledge and practical experience in finance, accounting and reporting. If established, a compensation committee is responsible for negotiating and approving directors' agreements and determining general policies for the remuneration of the management board, whereas a nomination committee is responsible for preparing nominations for the appointment of new management board members (including successor planning) and for the appointment of new supervisory board members.

Remuneration of the management board

The remuneration of the members of the management board is decided by the supervisory board (or the compensation committee, if any).

In determining the compensation for a management board member (which includes payments, bonuses, stock options or benefits in kind), several aspects have to be taken into account. The compensation should be appropriate both for the tasks allocated to the board member and the overall economic situation of the company. The compensation should include a fixed and a variable component; as regards the criteria for the variable component, it should be chosen so as not to incentivise inappropriate risks, and should not exclusively be based on financial figures. If management board members receive stock options, the vesting period must not be less than three years, and vesting should be based on long-term, measurable and sustainable criteria. There should be contractual safeguards implemented in the directors' agreements to claw back variable payments in the event a pay-out decision was based on obviously false data. Finally, a management board member should not be entitled to redundancy payments if his or her director's agreement is terminated on important grounds; in addition, redundancy payments should in any case be no more than two years' salary. The same principles also apply to senior management.

For listed companies, new rules on the remuneration of the management board were introduced in the legislation implementing the EU Shareholder Rights Directive. In particular, these rules require the formulation of a general remuneration policy, which has to be put to a (non-binding) vote of the general meeting every four years.

The remuneration of the management board has to be published both in the annual financial statements (on an aggregate basis) as well as in the annual remuneration report (on an individual basis, including the split between fixed and variable remuneration). The annual financial statements also have to disclose the number of stock options granted to management board members.

Remuneration of the supervisory board

The remuneration of the members of the supervisory board is either determined in the articles of association of the company or (more frequently) by a decision of the general meeting. Also, the remuneration of supervisory board members of listed companies must be included in the remuneration policy. Remuneration of supervisory board members in Austria is relatively low compared with other countries and usually comprises a base remuneration (which is typically higher for the chairperson, vice chairperson and committee members) and a meeting fee (which will be paid only to members attending a meeting). The remuneration of each supervisory board member is published annually in the remuneration report of listed companies. Although it is possible for supervisory board members to participate in stock option programmes, the Corporate Governance Code does not recommend it.

Board and company practice in takeovers

When faced with a takeover offer, the boards of the target company are bound by the objectivity principle set forth in the Takeover Act. This means that they are barred from taking any measures that would prevent the shareholders from taking a free and duly informed decision about the offer.

Both boards of a JSC are required to publish a reasoned statement regarding the offer, which is subject to a mandatory review by an independent expert. The statement has to contain, *inter alia*, an assessment of:

a the consideration offered by the bidder;

b the expected consequences of a successful takeover for the company, its employees (in particular the terms and conditions of employment and working conditions) and creditors;

c the strategic goals pursued by the bidder; and

d information about whether the members of the management board and the supervisory board recommend that shareholders should accept the offer.

If such a recommendation is deemed by the boards to be inappropriate, they are obliged to state arguments both for and against acceptance of the offer.

ii Directors

Management board

Appointment

Members of the management board are appointed by the supervisory board for a period of up to five years. It is possible (and customary) to renew an appointment, with the renewed term again being subject to the five-year limit. According to the Corporate Governance Code, the supervisory board is required to define profiles for the respective management board members and an appointment procedure as a basis for the appointment decision. As of 1 January 2018, supervisory boards of listed companies and unlisted companies with more than 1,000 employees must have at least 30 per cent female members (subject to certain exceptions). Supervisory board members may not be appointed management board members of the same company; for certain regulated industries, candidates for the management board need to fulfil additional criteria or pass a fit and proper test before they can be appointed.

Dismissal

Members of the management board can be dismissed by the supervisory board before the end of a term only on important grounds, in particular, if a board member has materially breached his or her duties, if the board member is unable to properly carry out his or her duties (both for health reasons or lack of required skills or knowledge) or if the shareholders adopt a vote of no-confidence (except if the vote was adopted for obviously inappropriate reasons).

Duties

As a general matter, the members of the management board of an Austrian company owe to the company (not the shareholders or any other constituents) the following duties:

a the duty of care, requiring members to exercise the level of care of a proper and diligent person in similar circumstances (which includes an obligation to be reasonably informed about areas allocated to other board members and articulate any concerns they may have);

b the duty of loyalty, requiring members to act in the best interests of the corporation (taking into account the interests of its shareholders and employees as well as the public good) and not in their own interests;

c the duty of confidentiality; and

d a duty not to compete.

Liability

Wilful or negligent failure to comply with these duties results in the personal liability of the responsible board members, unless the general meeting has lawfully approved a measure resulting in damage. As regards the duty of care, not every decision or transaction that results in a loss for the company is automatically deemed a breach. Based on the business judgement rule, which is included in statutory law, management board members are allowed to assume risks provided that those risks are not outside normal business practice or inappropriate given the economic situation of the company. A JSC may waive or settle its damages claims with an affirmative shareholder vote of 80 per cent after five years, or even before that with an affirmative vote of all shareholders.

Conflicts of interest

As a general rule, management board members shall make their decisions without being influenced by their own interests or the interests of controlling shareholders. If a management board member has a material personal interest in transactions of the company (or its subsidiaries) or other conflicts of interest, he or she has to inform the supervisory board and the other management board members without delay. Any transactions of the company with a management board member (or its related persons or entities) need to be on arm's-length terms, have to meet industry standards and have to be approved by the supervisory board. For other conflicts of interest not involving such transactions, the management board member should not participate in any discussions of the management board concerning the topic, and should be excluded from any information flow in this respect.

There are also statutory provisions and recommendations in place aimed at preventing (or limiting) potential conflicts of interest. The aforementioned non-compete duty prohibits management board members from operating other businesses, becoming supervisory board members in non-affiliated companies, becoming general partners of (entrepreneurial) partnerships or engaging in business transactions in the company's field of business, except – in each case – with the consent of the supervisory board. The Corporate Governance Code also recommends that management board members should not sit on more than four (or chair more than two) supervisory boards of non-affiliated companies, even with the supervisory board's approval. The Corporate Governance Code also recommends implementing similar restrictions for senior management. Finally, management board members are prohibited from becoming supervisory board members of the same company for a period of two years following the end of their term on the management board, unless they were nominated by shareholders holding more than 25 per cent of the total voting rights of the company.

Conflicts of interest may also arise in connection with any dealings by a management board member (or its related persons or entities) in the stock of the company (director's dealings). In this respect, management board members are required to report the trading to the Financial Market Authority within five banking days; the Financial Market Authority maintains a publicly accessible database for the reported trades. Additionally, listed companies are required to issue internal compliance guidelines that deal with the handling of, and the monitoring of access to, potential insider information. These internal compliance guidelines and their implementation are monitored by the Financial Market Authority.

Supervisory board

Appointment

Members of the supervisory board are elected by the shareholders' meeting, usually at an annual general meeting. The articles of association can also bestow nomination rights to shareholders (for up to one-third of the total number of supervisory board members). Supervisory board members are elected for a limited term, which has to expire – by law – at the latest with the completion of the fifth annual general meeting after their election. Re-elections are permissible. No term limitations are mandated for nominated supervisory board members. The Stock Corporation Act provides that shareholders should consider the following aspects when electing supervisory board members:

a the professional and personal qualifications of the candidates;

b whether the composition of the supervisory board (and the respective professional qualifications of its members) adequately accounts for the structure and business of the company; and

c diversity, appropriate age structure and internationality as well as the appropriate representation of women on the supervisory board.

Persons already holding multiple supervisory board positions (i.e., 10 positions in non-listed companies or eight positions in listed companies (with positions as chairperson counting as double), or a combination thereof) may not run for further supervisory board positions in listed companies. In addition, persons holding managerial functions in a JSC or any of its affiliated companies may not be elected to the supervisory board.

The employees' council (if established) of a listed JSC is entitled to delegate employee representatives to the supervisory board. For every two supervisory board members elected or nominated by the shareholders, the employees' council can delegate one representative. If the number of supervisory board members elected or nominated by the shareholders is uneven, the number of representatives to be delegated by the employees' council is calculated based on the next highest even number (e.g., if there are seven supervisory board members elected or nominated by the shareholders, the employees' council can delegate four representatives).

Dismissal

Members of the supervisory board can be removed from office during their term of appointment by a shareholders' resolution; this requires a 75 per cent majority of the votes cast, unless the articles of association provide otherwise. Members of the supervisory board delegated by the employees' council can be recalled at any time by the employees' council.

Duties

Members of the supervisory board are subject, in principle, to the same duties as members of the management board, which are scaled down to reflect the fact that the supervisory board members are mainly tasked with the monitoring and review of the conduct of the management board. One exception is that supervisory board members are not explicitly prohibited from competing with the company. However, any actual competition will always be scrutinised under the duty of loyalty to the company.

Liability

The liability standards applicable to management board members also apply to supervisory board members.

Conflicts of interest

In principle, the provisions regarding conflicts of interest of management board members also apply to supervisory board members, except that supervisory board members are not subject to a statutory non-compete obligation. In this respect, the Corporate Governance Code recommends supervisory board members not to assume functions on the boards of competing companies. As a precautionary measure, candidates running for a position on a supervisory board have to present to the general meeting information on all positions they hold and all other circumstances that could give rise to potential conflicts of interest. Supervisory board members are also subject to the same directors' dealing requirements as members of the management board, and are typically also covered by the internal compliance guidelines of the company.

III DISCLOSURE

Listed companies are required to prepare (consolidated) annual financial statements and half-yearly financial reports. In most cases, listed companies also prepare quarterly reports. The financial statements and reports have to be prepared in accordance with the International Financial Reporting Standards. In addition, listed companies also have to prepare stand-alone annual reports in accordance with Austrian Generally Accepted Accounting Standards.

The annual financial statements need to be audited by an independent auditor or auditing firm appointed by the general meeting based on a recommendation of the audit committee. Any auditor or auditing firm proposed as the annual auditor has to provide a statement to the general meeting confirming that neither of the statutory exclusion reasons apply, and disclosing its business dealings with the company during the past business year.

Listed companies also have to publish a corporate governance report with the annual financial statements. Besides certain information about the organisation, composition and remuneration of the boards of the company, and on the measures to promote appropriate representation of women on the management board, the supervisory board and in executive positions, the report in particular has to include a corporate governance statement. This statement has to include information as to whether – and if so, in what form – the company deviates from any comply or explain rules of the Corporate Governance Code.

Additionally, listed companies and their directors are subject to various disclosure requirements under the Stock Exchange Act and the EU Market Abuse Regulation, such as publication of directors' dealings and *ad hoc* disclosure. *Ad hoc* disclosure is aimed at preventing insider trading, and requires listed companies to publish without undue delay any non-public information concerning the issuer that could have a material effect on the market price of the securities of the company. Shareholders of listed companies have a statutory obligation to notify the company, the Stock Exchange and the Financial Market Authority if their shareholdings (whether direct or indirect) exceed certain thresholds (starting at 4 per cent, unless the articles of association lower the threshold to 3 per cent). Finally, the Beneficial Owner Register Act requires a company, whether listed or non-listed, to maintain a register of its ultimate beneficial owners, and report the identity of its ultimate beneficial owners electronically to the corporate service portal overseen by the Federal Ministry of Finance. The full information in this register is accessible for:

a public authorities;

b credit and financial institutions, attorneys, auditors, tax advisers, as well as certain other professionals for the purpose of performing know-your-customer checks; and

c any other person or entity that can prove a legitimate interest in connection with the prevention of money laundering or terrorist financing; and

d the general public, who can obtain extracts containing selected information from the register.

As of November 2020, the documents required for the identification and verification of beneficial owners can be submitted by professional representatives on behalf of their clients to the corporate service portal as a 'compliance package' voluntarily. These materials can then be used by relevant parties for the fulfilment of due diligence obligations.

IV CORPORATE RESPONSIBILITY

Corporate responsibility and compliance have become important topics in recent years, in particular in connection with corruption scandals and highly publicised criminal proceedings against management board members regarding anticompetitive practices. As a consequence, listed companies have introduced compliance codes and appointed compliance officers. These compliance codes materially influence daily corporate life and usually emphasise the principle of tone from the top. Many companies have also established whistle-blowing hotlines. Since the entry into force of the EU General Data Protection Regulation and the implementing legislation in May 2018, the establishment of such a hotline no longer requires the consent of the Data Protection Authority; however, its implementation and operation require the conclusion of a shop agreement with the employees' council.

V SHAREHOLDERS

i Shareholder rights and powers

Shares in JSCs have equal rights – except for limited exceptions provided by law – (i.e., equal voting, dividend and information rights). The Stock Corporation Act expressly prohibits golden shares (i.e., shares with multiple or disproportionately higher voting rights). However, it is permissible for a JSC's articles of association to introduce maximum voting rights or staggered voting rights. In addition, a JSC may issue non-voting preferred shares based on a shareholder resolution, whereas the nominal amount of the non-voting shares may not exceed one-third of the aggregate stated capital of the JSC.

Shareholders in listed companies have no direct influence on the management board and are not permitted to issue instructions or otherwise direct the management board. Their influence is limited to certain reserved decisions, which fall into the following three categories:

a certain decisions that require a shareholder resolution by operation of law, such as changes in the articles of association, appointment of supervisory board members, appropriation of distributable profit, acquisition of treasury stock, issuance of new shares or bonds, mergers, spin-offs or dissolution;

b the management board or the supervisory board may put certain decisions to the shareholders if no agreement can be reached between the boards; and

c there is an obligation to put certain fundamental business decisions to a vote by the shareholders; this requirement is not based on a statutory obligation but on a doctrine developed by the German Supreme Court, which was also followed by the Austrian Supreme Court.

Other rights of shareholders include the right to demand a convocation of a shareholders' meeting and the right to put certain matters on the agenda of a convened meeting (which requires the requesting shareholders to hold at least 5 per cent of the stated capital, unless the articles of association provide for a lower threshold) and the right to demand a special audit of the company (which requires the requesting shareholders to hold at least 10 per cent of the stated capital). All shareholders are entitled to request information about all items on the agenda for a shareholders' meeting, and are furthermore entitled to request that any of their statements (and the responses thereto) are recorded verbatim in the minutes of the meeting.

Dissenting shareholders are entitled to object to resolutions passed at a shareholders' meeting and can (if an objection was made) file for annulment or rescission of a resolution with the competent court in limited circumstances.

ii Shareholder duties and responsibilities

Shareholders of a JSC (both controlling and minority) are subject to a fiduciary duty requiring them not to directly cause harm to the company in the exercise of their shareholder right. Shareholders' resolutions breaching fiduciary duties may be contested and may give rise to damages claims against the JSC and its shareholders. Shareholders breaching this fiduciary duty may also be subject to damages claims by the company.

There are no specific duties for institutional investors other than the general duties applicable to all shareholders. There is also no code of best practice for shareholders of Austrian listed companies.

iii Shareholder activism

Shareholder activism has traditionally not performed an important role in Austria (unlike in Germany). However, Austrian activist shareholders, and the Austrian Shareholder Association, have increasingly been taking a more active role in representing free float shareholders.

Proxy battles do occur but not very frequently. The most recent example (in 2014) was an (initially unsuccessful) proxy battle at the general meeting of Conwert SE, at which minority shareholders tried to have two candidates elected to the board. This instigated a focus of shareholder activism in listed real estate companies in recent years.

As previously mentioned, shareholders in Austrian listed companies have no direct say as regards the remuneration of the directors, with the exception of stock option or transfer schemes, the introduction of which requires a vote of the shareholders. As of June 2019, shareholders also have an opportunity to vote on the general remuneration policy of listed companies; however, this vote is only a recommendation and non-binding.

iv Takeover defences

Listed companies have several options to implement general takeover defences prior to the launch of a hostile takeover bid, such as including provisions in the articles of association limiting the maximum voting rights per shareholder, introducing transfer restrictions (to the extent possible), and the staggered appointment of supervisory board members. The shareholders' meeting, however, can decide to include a provision in the articles of association that provides for the non-applicability of these defence provisions when a takeover bid is formally announced. Furthermore, the articles of association can also provide for a reduction of the threshold for mandatory offers to less than 30 per cent, which can also act as a deterrent.

If a hostile takeover is expected but not yet announced, additional measures can be employed, such as capital increases, purchase of treasury stock and reorganisations. The Takeover Act limits potential defence measures by the corporate bodies of listed companies once the listed company becomes aware of a hostile takeover bid. From this point on, the corporate bodies may only take measures aimed at preventing the success of the hostile takeover bid with the prior approval of the shareholders' meeting (except for the search of a white knight). However, any defence actions by corporate bodies have to be in line with the standard duty of care applicable to them; otherwise they can be held liable for any damage incurred.

v Contact with shareholders

Under Austrian law, listed companies are in general required to treat all shareholders in an equal manner. Therefore, as a matter of principle, any direct communication with shareholders is a sensitive matter and is only possible if an objective justification exists. An objective justification may exist, for example, if a listed company intends to acquire a business owned by one of its shareholders. In these circumstances, it is standard market practice to insist on a comprehensive secrecy agreement (which sometimes includes standstill covenants). If this is the case, listed companies typically impose internal restrictions so that only a limited number of persons (usually the management board and selected senior managers) have access to the information. If the transaction requires the consent of the supervisory board, the matter is sometimes delegated to a committee of the supervisory board to ensure confidentiality.

Selective meetings with individual shareholders usually take place during corporate roadshows or on capital market days. Additionally, several listed companies do schedule investors' calls, typically around the publication of financial information by the company. To avoid allegations of unequal treatment of shareholders, the presentations given during these events and recordings of investor calls are made publicly available on a company's website.

Legislative changes introduced in the implementation of the EU Shareholder Rights Directive made it easier for listed companies to get information about their shareholders. As of September 2020, intermediaries such as banks and brokers are obliged to inform a listed company of the identity of shareholders holding more than 0.5 per cent of the shares or voting rights.

VI OUTLOOK

On a general level, it must be noted that business decisions of the management boards of listed companies continue to be scrutinised more and more under criminal law aspects. Judgments of the Austrian Supreme Court have resulted in a high degree of uncertainty about whether certain business decisions could constitute fraud or embezzlement, and further clarifications by the courts would be welcome. However, the inclusion of the business judgement rule gives management boards more robust grounds for defence.

Appendix 1

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Martin Abram is a founding partner of Schindler Attorneys. Before establishing the firm, he spent 15 years at Wolf Theiss, where he became a partner in 2002. Mr Abram's practice focuses on corporate, real estate and financing work, with a particular focus on corporate and real estate mergers and acquisitions, corporate reorganisations as well as project and real estate financing. Furthermore, he is active in equity capital market transactions and commercial and residential leasing transactions. Mr Abram has published articles regarding corporate and energy law and is an author and co-editor of a book on the general meeting of Austrian stock corporations. Mr Abram is listed in international legal directories such as *Best Lawyers*, *The Legal 500*, *IFLR1000* and *JUVE*.

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Clemens Philipp Schindler is a founding partner of Schindler Attorneys. Before establishing the firm, he spent six years as a partner at Wolf Theiss, where he led some of the firm's most prestigious transactions and headed its Brazil operations. Prior to that, he practised with Haarmann Hemmelrath in Munich and Vienna, and with Wachtell Lipton Rosen & Katz in New York. Mr Schindler's practice focuses on corporate and tax advice in relation to public and private mergers and acquisitions (M&A), private equity and corporate reorganisations (such as mergers, spin-offs and migrations), most of which have a cross-border element. Mr Schindler is ranked by international legal directories such as *Best Lawyers*, *Chambers Global*, *Chambers Europe*, *The Legal 500*, *IFLR1000* and *Who's Who Legal*. The German legal directory *JUVE* singles him out as one of Austria's top 20 corporate and M&A lawyers, and the Austrian business journal *Trend* named him among the country's top 10 experts in both M&A and tax. Besides the listings for the Austrian market, both *Chambers Global* and *Chambers Europe* acknowledge his Brazilian expertise in a special ranking.

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